IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-668

IRVING M. MOLEVER; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian for LYNN E. WEINBERGER, a Minor, JILL A. WEINBERGER, a Minor and AMY D. WEINBERGER, a Minor; DON D. BROOKS; MODERN MARTS INC., a Pennsylvania Corporation; JEAN B. PARIS; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Corporation,

Petitioners,

v.

ROBERT LEVENSON; DONALD LEVENSON; REICHART FURNITURE COMPANY, a West Virginia Corporation; THE BANK OF WHEELING, a West Virginia Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INTRODUCTION.

This petition arises from judgments of the Court of Appeals for the Fourth Circuit (Bryan, Senior Circuit Judge) and of the United States District Court for the Northern District of West Virginia (Maxwell, C. J.), entered after substantial jury verdicts in favor of petitioners in three civil actions which were consolidated for trial by the District Court.

The three consolidated actions were an individual suit for defamation, a shareholders' derivative suit, and a suit for violation of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 of the Securities and Exchange Commission ("SEC").

The Fourth Circuit affirmed a judgment n.o.v. entered by the District Court which set aside a substantial jury verdict awarding compensatory and punitive damages in the defamation action. The Fourth Circuit reversed one phase of the shareholders' derivative suit in which a jury verdict and the trial court's judgment had awarded substantial compensatory and punitive damages, remanding that claim for new trial. With respect to the remaining claims, the second phase of the shareholders' derivative suit and the Rule 10b-5 claim, the Fourth Circuit directed final judgments for the defendants therein. A petition for rehearing, containing a request for new trial, was denied by the Fourth Circuit.

OPINIONS BELOW.

The oral opinion and written Orders of the District Court (App. A)[1] are unreported. The opinion of the Court of Appeals (App. B) is reported at 539 F. 2d 996 (4th Cir. 1976). The denial by the Court of Appeals of rehearing (App. C) has not been reported as of this time.

JURISDICTION.

The opinion and judgment of the Court of Appeals for the Fourth Circuit were entered on May 3, 1976 (App. B). A timely petition for rehearing was denied by the Fourth Circuit on June 16, 1976 (App. C). Upon petitioners' request, an Order of this Court entered September 2, 1976 extended the time for filing this petition to and including November 13, 1976. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

1. All citations herein to "App." are to the Appendix, *infra*, to this Petition. References designated "NT" are to Volumes 2-10 of the Agreed Deferred Appendix in the Court of Appeals. References to exhibits, contained in Separate Volume Containing Exhibits for Case No. 75-1107 and No. 75-1108 in the Court of Appeals, are designated "Ex." (Exhibits D-50 and D-100, *infra* pages 10 and 11, were not included in the Separate Volume on appeal.)

QUESTIONS PRESENTED FOR REVIEW.

Defamation Suit.

1. Whether, in view of this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 351 (1974), and *Time, Inc. v. Firestone*, 424 U. S. 448, 453-54 (1976), in a diversity action for violations of state laws of defamation, it was fundamental error for a trial court, and likewise the Fourth Circuit which affirmed a judgment n.o.v. entered by the trial court, to determine as a matter of law that a former president of a small, closely-held local bank, was an "organization" or "public" figure, and therefore not protected from calculatedly false defamatory statements that repeatedly charged him with dishonesty and breaches of fiduciary duties, in order to cover up and divert attention from defendants' own frauds and wrongs.

2. Whether this Court should not resolve the conflict among the Circuits as to the propriety and authority of a federal trial court to invade the jury's province by overturning its verdicts, and to substitute the court's own judgment of the evidence and the inferences therefrom necessary to support a finding of malice in a defamation action—a procedure which the Fourth Circuit has approved and upheld in this case, but which denies the defamed party the benefit of all inferences that the evidence fairly supports, as well as the protection of the Seventh Amendment, and departs from the requirements of this Court's decisions.

Shareholders' Derivative Suit.

1. Did not the Fourth Circuit err in reversing a jury verdict and the trial court's judgment, in a shareholders' derivative suit based on diversity, invalidating a release of two executive officers and directors from all liability for their misappropriations of bank assets and frauds, granted by other directors without approval of all stockholders, an appellate decision in square conflict with important state law and public policy? [2]

2. In reversing a jury verdict and the trial court's judgment in a shareholders' derivative suit based on diversity, which invalidated a release of directors for their misappropriations and frauds, granted without approval of all stockholders, did not the Fourth Circuit radically depart from fundamental standards of appellate review by holding that the released defendants had proved to it "the justice and bona fides" of the release?

Securities Fraud Suit.

1. Whether debtors who had pledged bank stock to secure a loan have standing to bring a suit for violation of Securities and Exchange Commission Rule 10b-5 where, after their default on the loan, as part of a scheme to buy up over 50% of the bank's stock, they were intentionally deceived and dissuaded, by means of a report to stockholders and financial statement of the bank which omitted to state material facts, from exercising their right to cure the default and reacquire the stock.

2. Whether the Fourth Circuit erred in reversing judgment on a jury verdict in a Rule 10b-5 suit by determining that factual omissions from a report to stockholders and bank financial statement were as a matter of law not material in determining their choice of action,

2. *Chounis v. Laing*, 125 W. Va. 275, 291-92, 23 S. E. 2d 628, 637-38 (1942); West Virginia Code, 1931, as amended, § 31-1-69 (repealed effective July 1, 1975); see also *Rogers v. Hill*, 289 U. S. 582 (1933).

contrary to this Court's decision in *TSC Industries, Inc. v. Northway, Inc.*, – U. S. – , 96 S. Ct. 2126 (1976).

Overall Question.

Whether, because of views expressed in prior opinions of this Court,[3] upon consideration of a petition for rehearing containing a new trial request by the verdict-winners in consolidated actions, it was not error for the Fourth Circuit to fail itself to grant a new trial or remand *all* of the consolidated actions to the trial court for determination of that issue, particularly because it had held and ordered:

> (a) that an "ill-advised consolidation" and improper "curtailment" of trial time by the trial court was reversible error, prejudicial to defendants (the verdict-losers), and
>
> (b) that a new trial was therefore required for those defendants in *one* of the actions, but
>
> (c) that final judgment should be entered for defendants in the remaining cases despite the existence of equal or greater prejudice to plaintiffs (the verdict-winners) from the improper "curtailment."

3. *Cf. Iacurci v. Lummus Co.*, 387 U. S. 86, 88 (1967) (*per curiam*); *Neely v. Martin K. Eby Construction Co., Inc.*, 387 U. S. 317, 328-29, *rehearing denied*, 386 U. S. 1027 (1967); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, 808-09 (1949).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

U. S. Constitution, First and Seventh Amendments (App. D, p. 48a).

Securities Exchange Act of 1934, § 10(b), 15 U. S. C. § 78j(b) (App. D, p. 48a).

Securities and Exchange Commission Rule 10b-5, 17 C. F. R. § 240.10b-5 (1976) (App. D, p. 49a).

N. Y. Uniform Commercial Code § 9-506 (App. D, p. 49a).

West Virginia Code § 46-9-506 (App. D, p. 49a).

12 Purdon's Pa. Stat. Ann. § 1584a (App. D, p. 50a).

West Virginia Code, 1931, as amended, § 31-1-69 (repealed effective July 1, 1975) (App. D, p. 50a).

Federal Rules of Civil Procedure, Rule 50(c)(2) and (d) (App. D, p. 51a).

STATEMENT OF THE CASE.

Plaintiff Irving Molever, then a Pittsburgh, Pennsylvania resident, participated in organizing The Bank of Wheeling, a West Virginia banking corporation, which began business on April 5, 1965 with an initial capital of $500,000 (NT 2264, 2271-73). The bank was insured by the Federal Deposit Insurance Corporation (NT 206). The Molever interests purchased about 20% of the bank's initial capital stock (NT 2273-75), and Molever became non-salaried president (NT 1315). Molever was not involved in the bank's day-to-day operations, but relied upon and delegated to others those functions (NT 551-52, 558, 654, 788-89, 1069, 2269-72).

Robert Levenson, a wealthy Wheeling merchant and West Virginia resident, also bought initial stock of the bank and became a director and Chairman of its Executive and Loan Committees (NT 375, 2264-65, 2307-12, 2329-30). At his urging, Donald Levenson, his brother and business partner, also a West Virginian, became a director and Chairman of the bank's Audit Committee (NT 2310-12). The Levensons owned two large retail furniture chains located primarily in the Wheeling area, and they had extensive experience in installment lending (NT 2307-09, 2318-19, 4065-66). The Levensons' office was in the same block as that of the bank, and almost daily they were present at the bank (NT 609, 797; see Ex. P-17). Actually the Levensons controlled bank operations and made the important decisions (NT 555, 558-59, 797, 1069-70). By the fall of 1965 the bank's board became factionalized among three groups: the Levensons and their allies—the Molever group—and some neutral directors (NT 4066). It then became apparent in early 1966 that the Levensons were both out to "get" Molever and gain control of the bank (NT 1159, 1513-14, 4066).

A. Shareholders' Derivative Suit.

1. *Floor plan scheme.* In May 1965, a month after the bank started business, the Levensons began and carried on a fraudulent floor plan scheme (*stoutly defended as proper by the Levensons' trial counsel* (NT 862-63), *but then finally conceded to be an indefensible "deceit" by their new counsel in their Brief* (at p. 21) filed *in the Court of Appeals.*[4]

This scheme had several aspects. Initially, the bank was caused by the Levensons merely to send its cashier's check to merchandise suppliers of Levensons' company, Reichart Furniture, a West Virginia corporation, to pay specific invoices directed to Reichart based on an alleged floor plan arrangement which never in fact existed (NT 776-78, Ex. P-17, P-18).

Later, at the insistence of Reichart's suppliers for independent documentation to support the actual existence of a bank floor plan arrangement, the Levensons, indulging in another subterfuge, took bank stationery and had Jay Noel, the bank's vice president and principal operating official, sign letters to Reichart's suppliers which falsely stated that the bank had in fact deducted interest charges from amounts invoiced by suppliers to Reichart under this fictitious and nonexistent floor plan arrangement (Ex. P-19 through P-27, P-31). Thus Reichart was enabled illegally to obtain "interest refunds" from its suppliers which it had never in fact paid to the bank.

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4. As another example of their dissembling in the proceedings before the trial court, during the more than six years from institution of the shareholders' derivative suit in 1968 to the time of its trial in 1974 defendants had claimed to have "lost" the bank's floor plan file, and took the position at the beginning of the trial in answer to plaintiffs' subpoena that it had "just disappeared." Later in the trial it was "found," and the then president of the bank, Hungerman, testified that a "thorough search" had finally uncovered the file "buried in the back of a door" in a vault (NT 305-06, 4194-96).

The last aspect of this Levenson scheme took the form of the Levensons causing Noel to sign letters, again purportedly on behalf of the bank, which fraudulently asserted that the bank had in fact charged Reichart additional interest for overdue payments on these sham financing arrangements (Ex. P-32 through P-35).

By these fraudulent practices, which Levensons' attorneys at the trial denied, but then on appeal admitted, not only were funds diverted from the bank to the Levensons, but the bank was made an accomplice to this conspiracy to defraud which had been concealed from Molever and other bank directors, the Federal Deposit Insurance Corporation and the state banking examiners (see NT 219).

This fraudulent floor plan scheme was continued until the end of April 1966, when its true nature was discovered by Molever who then immediately stopped the scheme and brought the matter to the attention of the bank's Board of Directors (NT 2543-46; see Ex. P-62, NT 224, 658, 1155-57).

Despite these fraudulent and indeed criminal activities of the Levensons, involving the bank, the directors, although aware of the improprieties, and with the Levensons present at the time of the discussion and vote, nevertheless voted on April 27, 1967 to release them from all liability in exchange for "One Dollar ($1.00)" and an indemnification agreement, an action which did not have approval of all the stockholders (Ex. D-50; see also D-49, D-170, D-606, P-114).

Minority shareholders, nonresidents of West Virginia, sued in 1968 derivatively on behalf of the bank the Levensons and Reichart Furniture for damages caused by their scheme. Jurisdiction was based on diversity of citizenship, 28 U. S. C. § 1332(a). The jury returned a verdict for plaintiffs against the Levensons and their company for

$23,520 compensatory and $1 million punitive damages (NT 4340). The trial court entered judgment on the verdict, but the Fourth Circuit reversed and held that defendants had substantiated the "justice and bona fides" of the release by evidence which was "clear and convincing" and "overwhelming," and ordered that final judgment be entered for defendants (App. B, p. 37a).

2. *Dennis loan losses.* Beginning in the fall of 1965, Jay Noel, the bank's loan officer, began to buy consumer loans on a non-recourse basis from Paul Dennis, a Wheeling automobile dealer (NT 333, 1074-75, 2731, Ex. P-277). The Levensons reviewed the bank files pertaining to these transactions, conferred frequently with Noel, and encouraged their continuance (553-55, 593, 1072-75, 1847-48, 2350-53). Noel's transactions were based upon inadequate credit information; in some instances borrowers used fictitious names, and car sale prices were inflated (NT 332-33). As a result of these Dennis loans, the bank suffered losses which exceeded $600,000 (NT 301).

Despite evidence that the Levensons early knew the Dennis loan transactions were both unsound and improper, they raised no warning with the directors, officers or employees of the bank and suppressed such information from Molever and other bank directors (NT 546, 565-70, 644, 1234-38, 1252-59, 1837-39, 2393-97, 2443-45, Ex. P-61, ¶ 2, D-100). Even more shocking, after the true nature and magnitude of the Dennis loan losses surfaced, the Levensons privately offered Noel the presidency of the bank in March 1966 (NT 1309, 1894-96).

Molever knew nothing about the real facts concerning the Dennis loan transactions until the problem was revealed in February 1966 (NT 582-83, 1148-55, 2372-76, 2393-97, 2445-48, 2645-47). Noel admitted to the Executive Committee of the bank's board on April 5, 1966

that he had concealed such information from Molever (Ex. P-203).

An investigative report of the Federal Deposit Insurance Corporation concluded that the Levensons had "been engaged for years in instalment financing at their own places of business, and should have recognized the danger signals inherent to this type of financing" (Ex. D-592).

In the phase of the shareholders' derivative suit which challenged the Dennis loan transactions, the jury returned a verdict against the Levensons for their liability on the Dennis loan losses in the sum of $600,000 compensatory and $100,000 punitive damages (NT 4340-41). Judgment thereon was entered by the trial court. The Fourth Circuit reversed this judgment and remanded this claim for a new trial because consolidation and joint trial of the three separate lawsuits was deemed by it to have been "ill-advised," and because a "curtailment" of the available trial days was "seriously injurious to the defendants" and an unreasonable exercise of trial court discretion (App. B, pp. 40a-42a).

B. Defamation Suit.

Molever resigned as president of the bank in August 1966 (NT 2439). A month later, Robert Levenson issued a letter to the bank's Board of Directors which was at his insistence included in the minutes of its September 29, 1966 meeting, stating that: (1) Molever was "incompetent" and "inadequate," (2) Molever had purposely and intentionally kept the Executive Committee "uninformed" and "misinformed" (a repetition of a charge made by Levenson in May 1966), and (3) Molever was to blame for the Dennis loan losses (a repetition of a written statement published by Levenson in April 1966 to the bank's Executive Committee) (NT 2773-84, 2876, Ex. P-257, P-258, P-259). During a recess at a bank shareholders' meeting

held January 19, 1967, Robert Levenson told several Pennsylvania shareholders that Molever was "inadequate and incompetent," was "fully aware of the floor plan from the beginning," and was "fully aware and participated in the Dennis auto loans from the beginning" (NT 1975-79). On April 21, 1967, Joseph Gompers, who was acting on behalf of the Levensons, wrote the bank's president and accused Molever of having "negotiated and approved the said floor plan" (Ex. D-166).[5]

Molever suffered injury to his reputation in Wheeling and Pittsburgh and thereafter in Scottsdale, Arizona, to which latter place he had moved in December 1966; his earnings, earning power, credit standing, and assets were severely damaged and diminished (NT 2073-74, 2153-57, 2256-57, 2261-62, 2623-24, 2731-32, 3224-27, 3647).

In a defamation action brought by Molever in 1967, with jurisdiction based on diversity, the jury returned a verdict against Donald and Robert Levenson for $500,000 compensatory and $1,000,000 punitive damages for slander, and against Robert Levenson for $750,000 compensatory and $1,000,000 punitive damages for libel (NT 4341-42). The trial court granted defendants judgment n.o.v. because (1) Molever was "very decidedly" a public figure as a former bank president, (2) defendants' statements were qualifiedly privileged under state law and (3) "[b]ased on the record we have here and recognizing again, the restrictive contracting field of libel and slander,

5. Gompers on behalf of the Levensons had made this charge at a Board meeting of the Bank on June 23, 1966 (NT 4048-49). As attorney for Donald Levenson at trial he called Molever a "crook" and a "thief" (NT 149-50). In March 1971, Abraham Pinsky, an attorney for Robert Levenson before and at trial, and an attorney engaged by the Bank after the Levensons gained control, in a letter to the Washington Post and Los Angeles Times, while acknowledging Molever's protestations of innocence, repeated the previous defamatory charges against him (NT 2636-39, 2616, 2679-80, 3480-86, Ex. P-246).

it would appear that the statements and the expressions that were made here were made in good faith insofar as this record is concerned" (App. A, p. 20a). The Fourth Circuit affirmed.

C. Securities Fraud Suit.

On January 5 or 6, 1968, Molever received telegrams advising him that Irving Trust Company had assigned to Robert Levenson a promissory note executed by Molever and two of his companies, together with their stock of The Bank of Wheeling pledged as collateral (NT 2286-88, 2679-90, Ex. P-231 through P-239, P-253). Levenson telegrammed Molever that the note was past due and that the collateral would be sold at private sale after January 11, 1968; on January 12 Levenson sold the stock to himself, and several days thereafter had it transferred to his wife (NT 600-01, 2681-82, 3664).

Unknown to Molever, during 1967 the bank had recovered $170,000, over one-third of its total capital, from its bonding company as a result of the Dennis loan losses. Previously the bank's counsel, engaged by the Levensons, had advised that the prospect of any recovery was "dismal" (NT 2616, 2694-95, 3628-29, Ex. D-606).

By a report, dated January 6, 1968, which the bank sent to its shareholders, including Molever, there was enclosed a statement of financial condition as at December 29, 1967 (NT 2691-93, Ex. P-247). Neither the report nor the financial statement gave any indication of this material recovery on the Bankers Blanket Bond. In addition, the fact of this recovery could not possibly have been ascertained from the statement (NT 2694-95).

In an action commenced in 1970 under Sec. 27 of the 1934 Act, 15 U. S. C. § 78aa, for violation of Sec. 10(b) of that Act, 15 U. S. C. § 78j(b), and SEC Rule 10b-5

promulgated thereunder, the jury returned a verdict in favor of plaintiffs against Robert Levenson for damages of $59,496, upon which the trial court entered judgment (NT 4341). The Fourth Circuit reversed and ordered that final judgment be entered for defendant, on the grounds that there was no scheme to defraud in connection with the stock purchase and that plaintiffs had been given due notice of the intended sale and had received a financial statement "showing" the bond recovery (App. B, p. 34a).

In connection with all of the above-described actions taken by the Fourth Circuit in the three consolidated suits a petition for rehearing, which contained a request for new trial, was denied (App. C, pp. 46a-47a).

REASONS WHY WRIT SHOULD BE GRANTED.

I. The "Organization Figure" Test Adopted by the Trial Court, and Sanctioned by the Fourth Circuit, Is Not a Proper Standard for Determining Whether a Defamed Party Is a "Public Figure."

In granting the Levensons' motion for judgment n.o.v. on the defamation claims, the trial court characterized Molever as a "public figure" solely because he had been a "recently terminated" bank president and director (App. A, p. 19a). (In fact, as the record shows, the defamatory statements were also repeated and republished approximately five years after Molever's termination as bank president and director.) Because of this characterization of Molever as a "public figure," the trial court required Molever to prove malice, as that term is defined in *New York Times Company v. Sullivan,* 376 U. S. 254 (1964), to recover damages for the defamation (App. A, pp. 16a-19a).

This holding was predicated on *Evans v. Lawson,* 351 F. Supp. 279 (W. D. Va. 1972), which held that a vice president of Lions International, a world-wide organization, by assuming that role, "decreased" his "right to privacy and freedom from defamation . . . with respect to the other members of or people who have a direct, substantial, and significant interest in the same organization" (351 F. Supp. at 286).

Here, despite this Court's holding in *Gertz v. Robert Welch, Inc.,* 418 U. S. 323 (1974), the trial court made applicable both the *New York Times* malice test and the *Evans* "organization figure" test to defamation of a private individual who was a former president and director of a small, closely-held bank to justify entering judgment n.o.v.

for defendants, although common law as well as constitutional malice had been clearly established.

Gertz defined a "public figure" in the following fashion (418 U. S. at 345):

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

Time, Inc. v. Firestone, 424 U. S. 448, 563-64 (1976), reaffirmed this *Gertz* "public figure" definition, holding that a socially prominent Palm Beach woman was not a "public figure" and therefore could recover damages for libel without proof of *New York Times* malice.

The defamed petitioner in this case can hardly be called a "public figure" simply because he was a former "organization figure." So to hold will inexorably lead to relinquishment of their interest in good-name protection by countless persons throughout this country who hold or held positions in organizations, big or small, private or public, fraternal, religious, charitable, or otherwise. If this be the law, then determination of who is such a "public figure" (other than those who have achieved positions of "persuasive power and influence") should be a fact issue for a jury whose findings, derived from competent evidence and inferences, comport with the *Gertz* and *Firestone* standards. *Cf. Hamling v. United States,* 418 U. S. 87, 104-06, *rehearing denied,* 419 U. S. 885 (1974).

II. The Judgment N. O. V. for Defendants in the Defamation Suit, Reflecting a Conflict Among the Circuits, Violated Plaintiff's Seventh Amendment Right and Departed From This Court's Decisions.

The trial court overturned substantial jury verdicts and entered judgment for defendants on the defamation claims because (App. A, p. 20a):

> "Based on the record we have here and recognizing the restrictive contracting field of libel and slander, it would appear that the statements and the expressions that were made here were made in good faith insofar as this record is concerned."

The Fourth Circuit held that the trial judge "quite rightly" concluded that the statements were qualifiedly privileged and not excessive, and, without any discussion of the evidence, stated (App. B, pp. 44a-45a):

> "Furthermore, his ruling that the evidence was insufficient to allow the jury to find malice or ill-will was a correct legal conclusion."

In reviewing a motion for judgment n.o.v., it is fundamental that a court is "bound to view the evidence in the light most favorable" to the verdict-winner, and to give him "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-97 (1962); 5A Moore, Federal Practice ¶ 50.07[2], pp. 2355-57 (1975) (the constitutionality of a judgment n.o.v. depends on this standard). Generally, where motivation and intent play leading roles, an issue is *peculiarly* for the trier of fact. See *Poller v. Columbia Broadcasting System, Inc.*, 368

U. S. 464, 473 (1962); *TSC Industries, Inc. v. Northway, Inc.*, — U. S. —, 96 S. Ct. 2126, 2133 at n. 12 (1976). Under the Seventh Amendment, "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U. S. 474, 486 (1935).

Despite these settled principles, in this case the trial court, sanctioned by the Fourth Circuit, conducted its own independent evaluation of the witnesses' credibility and arrived at its own view of the inferences to be drawn from the evidence. From this it concluded (contrary to the jury verdict) that the defamatory statements were made "in good faith." This trial court action reflects a view held by certain Circuits that such independent examination of the record is necessary in defamation cases involving proof of *"New York Times"* malice. See, *e.g.*, *Wasserman v. Time, Inc.*, 424 F. 2d 920, 922-23 (D. C. Cir. 1970) (concurring opinion); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858, 864-65 (5th Cir. 1970). *Contra, Guam Federation of Teachers v. Ysrael*, 492 F. 2d 438 (9th Cir.), *cert. denied*, 419 U. S. 872 (1974); see also *Carson v. Allied News Co.*, 529 F. 2d 206, 213 n. 15 (7th Cir. 1976).

As was noted in the *Guam* case, no First Amendment decision of this Court supports the conclusion that federal courts in defamation cases may, contrary to the Seventh Amendment, reexamine the facts as tried (and found) by a jury. Indeed, in any event, the present case contains an abundance of evidence of defendants' malice, whether tested under common law or constitutional law standards.[6]

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6. At common law, malice exists where "the defendant was actuated by ill-will or improper motive, or . . . acted causelessly and wantonly, to the injury of the plaintiff." *Rigney v. W. R. Keesee & Co., Inc.*, 104 W. Va. 168, 172, 139 S. E. 650, 651 (1927), quoting from *Hansen v. Hansen*, 126 Minn. 426, 427, 148 N. W. 457 (1914). *Accord, Weenig v. Wood*, — Ind. App. —, 349 N. E. 2d 235 (1976). Even had Molever been a legitimate "public figure,"

Defendants' defamatory statements contained two separate attacks upon Molever's honesty and integrity: first, that Molever had known about and aided and abetted the illegal floor plan scheme; and second, that Molever was fully aware of and responsible for the Dennis loan losses, and had suppressed pertinent information concerning these losses. Each of these lies was deliberately concocted by the Levensons to divert attention from themselves, the actual wrongdoers.

As to the floor plan scheme, the evidence in the record was clear that Molever knew nothing about it until at the end of April 1966, he discovered and stopped these illegal practices. Concerning the Dennis loans, the evidence in the record is equally clear that the Levensons reviewed these transactions and, despite their own experience with consumer financing, encouraged them. It was the Levensons who concealed information about the Dennis loans from Molever as well as other bank directors. These disastrous losses on the Dennis loans were in fact utilized by the Levensons as an essential step in their plan to gain control of the bank because it enabled them to use their wealth to buy up the bank's stock.

The failure of the Levensons to testify at trial or otherwise support their defamatory statements itself gave rise to inferences adverse to them. See *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 221 (1939); McCormick, Evidence § 272 (2d Ed. 1972); 2 Wigmore, Evidence § 289 (3d Ed. 1940).

Moreover, under West Virginia law false imputation of a crime or moral delinquency is in and of itself an abuse of a qualified privilege, rendering proof of common law

6. (Cont'd.)

then a finding of malice under First Amendment standards requires only proof that defendants knew their defamatory utterances were false or acted with reckless disregard of the truth. *Gertz v. Robert Welch, Inc., supra*, 418 U. S. at 327-28.

malice by the plaintiff unnecessary and placing upon the defaming party the burden of proving the truth of the accusation.[7] *England v. Daily Gazette Company*, 143 W. Va. 700, 710-11, 104 S. E. 2d 306, 312-13 (1958). Each renewal or repetition of a defamatory statement is further evidence that malice motivated and actuated the original statement. *Id.*, 143 W. Va. at 715-16, 104 S. E. 2d at 315; *Stewart v. Riley*, 114 W. Va. 578, 583, 172 S. E. 791, 794 (1934) (plaintiff is entitled to go to the jury on the issue of malice when there is subsequent utterance of the same or similar defamatory words); Annot., 12 A. L. R. 1026 (1921). Here the Levensons and their spokesmen, actually continuing even through the trial of the case almost eight years after Molever's bank tenure ceased, repeatedly made false charges against Molever of criminal acts and willful breaches of fiduciary duties, all for the purpose of covering up and diverting attention from their own crimes and derelictions.

Finally, the Levensons clearly exceeded the scope of any qualified privilege they might have had to defame Molever by causing their false statements to be published to persons who had no legitimate interest in the subject matter of these accusations. See *Porter v. Eyster*, 294 F. 2d 613, 618 (4th Cir. 1961) and cases cited therein.[8]

7. Molever, who was a Pittsburgh, Pennsylvania resident (NT 2064) at the time of some of the defamatory statements, was likewise protected by a Pennsylvania statute, the Act of August 21, 1953, P. L. 1291, § 1, 12 Purdon's Pa. Stat Ann. § 1584a, which specifically placed upon the defendants in the defamation action the burden of proving the truth of their defamatory statements and the privileged character of the occasions on which they were published.

8. As an example, one of Levensons' spokesmen in 1971 republished statements defamatory of Molever in a letter to the Washington Post and Los Angeles Times (NT 2636-39).

III. The Release of the Levensons for Their Floor Plan Frauds Violated Important Substantive State Law and Public Policy, and Its Approval by the Fourth Circuit Was an Erroneous Departure From This Court's Standard of Appellate Review.

At the time of approval by the bank directors of the release to the Levensons for their participation in the fraudulent floor plan scheme, the following provision applicable to The Bank of Wheeling was in effect as set forth in the West Virginia Code, 1931, as amended, § 31-1-69 (repealed effective July 1, 1975):

> "No member of the Board of Directors shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president or other officer or employee, *or be present at the Board while the same is being considered* . . ." (Emphasis added.)

See *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443, 453-55, 4 S. E. 431, 437 (1887); *Hope v. Valley Salt Company*, 25 W. Va. 789, 807 (1885).

In addition, under decisions of the Supreme Court of West Virginia, the corporate action granting such release was ultra vires as to nonconsenting stockholders, and therefore not binding upon them. *Chounis v. Laing*, 125 W. Va. 275, 291-92, 23 S. E. 2d 628, 636-37 (1942), and the cases cited therein.

Despite this West Virginia statute, the decisions of the West Virginia Supreme Court, and the undisputed evidence in the record that (1) the Levensons *were present* at the time of the dicussion and vote by the other bank directors approving the "One Dollar ($1.00)" release to them and accepting their indemnification for their floor plan frauds—the latter being conduct which the Levensons' new counsel in the appeal conceded was indefensible "deceit," and (2) this release and indemnification was *not* approved by *all* the bank's stockholders, the Fourth Circuit in its decision paid no heed to this applicable West Virginia substantive state law and policy. Instead, it chose to rely solely upon its own decision in a personal injury case where, by the very opinion, "the evidence of fraud or misrepresentation . . . [was] non-existent." *Chesapeake & O. Ry. Co. v. Chaffin*, 184 F. 2d 948, 952 (4th Cir. 1950).

To compound the error, the Fourth Circuit chose to adopt a standard of appellate review in fundamental conflict with the settled standard which an appellate court must adopt in scrutinizing the sufficiency of the evidence to support a jury verdict. *E.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-97 (1962).

The standard of review under West Virginia law to overcome the terms of an express release in a personal injury case where fraud or misrepresentation is absent has never been applied to sustain a release granted without approval of all the stockholders by corporate directors to fellow directors for their admitted misappropriation of assets and frauds.

IV. Debtors Who Pledged Stock to Secure a Loan Have Standing to Sue for Damages Under SEC Rule 10b-5 if They Have Been Deceived Into Not Exercising Their Right to Cure the Loan Default and Reacquire the Pledged Stock.

Plaintiffs in the securities fraud suit had pledged their stock of The Bank of Wheeling as collateral for a loan. When this loan was in default, defendant Robert Levenson bought it up to obtain the bank stock which was the col-

lateral. Notice was then given by him to plaintiffs that the loan was in default and the collateral would thereafter be sold. The day after such notice was sent, a report of the Chairman and President, together with a financial statement of The Bank of Wheeling, was caused to be mailed to plaintiffs by the Levensons, who then controlled the bank. Both this report and financial statement omitted to disclose that a substantial monetary recovery amounting to a significant portion of the bank's capital had been effected. Theretofore, the prospect of such recovery had been described to plaintiffs as "dismal."

No one, not even the most sophisticated investor or certified public accountant, reading these documents could have detected this large recovery, which under normal, let alone generally accepted, accounting principles, should have been treated as an extraordinary item or footnoted. *Cf. In re Associated Gas & Electric Co.*, 11 S. E. C. 975, 1058-59 (1942); *United States v. Simon*, 425 F. 2d 796, 806-07 (2d Cir. 1969), *cert. denied*, 397 U. S. 1006 (1970); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S. D. N. Y. 1974) (*appeal pending*). Because of this, plaintiffs took no action to cure the loan default and reacquire their pledged stock, and thus defendant Robert Levenson was enabled to foreclose on the bank stock collateral, buy it in himself, and then transfer it to his wife.

In *Dopp v. Franklin National Bank*, 461 F. 2d 873, 885 (2d Cir. 1972), Mr. Justice Clark, sitting by designation, stated in dissent that a pledgor whose stock is sold by the pledgee is a seller, protected under Rule 10b-5. However, in that case the majority of the panel did not rule on the issue. 461 F. 2d at 878, n. 13.

This Court held in *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723 (1975), that a right to sue for damages for violation of SEC Rule 10b-5 is limited to purchasers or sellers of securities. This Court ruled, however, that:

> "A contract to purchase or sell securities is expressly defined by § 3(a) of the 1934 Act, 15 U. S. C. § 78c(a), as a purchase or sale of securities for the purposes of that Act." (421 U. S. at 750-51 (footnote omitted).)

Plaintiffs in the present case had a contractual right to redeem and reacquire the bank stock. See N. Y. Uniform Commercial Code § 9-506; W. Va. Code § 46-9-506. In addition, the very notice of intent to foreclose the defaulted loan and sell the defaulted collateral gave rise to the clear implied right of the debtor-plaintiffs to cure the loan default and reacquire the stock. See Restatement, Contracts § 90 (1932).

Although the jury verdict and trial court judgment awarding damages to the plaintiffs for their losses in connection with this matter thereby established all of the factual elements required as a condition precedent to a Rule 10b-5 recovery, nevertheless by reversing such finding and judgment the Fourth Circuit determined as a matter of law that there was no scheme to defraud in connection with the purchase or sale of stock and that the factual omissions from the report and bank financial statement were not omissions of material facts (App. B, p. 34a). This action represents a clear and unwarranted departure from this Court's recent decision in *TSC Industries, Inc. v. Northway, Inc.*, — U. S. —, 96 S. Ct. 2126, 2133 (1976), which held that the ultimate determination of materiality requires "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts," which "assessments are peculiarly ones for the trier of fact." More-

over, the general standard of materiality contemplates "a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder" in determining his choice of action. 96 S. Ct. at 2133.

Also to be noted, in view of the jury's verdict and the trial court's judgment, is that such Fourth Circuit determination as a matter of law that there was no liability for violation of Rule 10b-5 is contrary to the proper standard of appellate review. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-97 (1962).

V. The Procedure to Be Followed by Circuit Courts Upon Consideration of New Trial Requests by Verdict-Winners, Contained in Petitions for Rehearing, Is an Important Question for Resolution by This Court.

Federal Rule of Civil Procedure 50(c)(2) provides that a party whose verdict has been set aside on motion for judgment n.o.v. *may* then serve a motion for new trial within 10 days thereafter. However, this procedure is not intended to be exclusive. The Advisory Committee's Note to the rule states (31 F. R. D. 646):

> "Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judg nent n.o.v. not only to urge that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial."

Rule 50(d) provides that if the motion for judgment n.o.v. is denied, on appeal the verdict-winner *may* assert grounds for a new trial. Rule 50(d) continues:

> "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

In the present case, the unusual result of the Fourth Circuit's denial, without discussion, of plaintiffs' (the verdict-winners') petition for rehearing, containing a request for new trial, was the following:

> (1) the affirmance of the grant of judgment n.o.v. in favor of the defendant Levensons (the verdict-losers) in the defamation suit;
>
> (2) the reversal of the damage verdicts and judgments in the shareholders' derivative suit,
>
> (a) entering final judgment for the defendant Levensons and Reichart Furniture on the floor plan scheme, but
>
> (b) remanding at the request of defendants for a new trial the claim arising from the Dennis loan losses; and
>
> (3) the reversal of the damage verdict and judgment for the plaintiffs in the Rule 10b-5 securities fraud suit, with entry of final judgment for the defendant.

In cases involving Rule 50, this Court has expressed the view, but has never held, that a Circuit Court should remand to the trial court for its determination a request for new trial made on appeal by a verdict-winner, where the record is replete with new trial issues, unless the appellate court itself orders a new trial, or unless the request is so clearly frivolous as to be facially without merit.

This view may be gleaned from the following cases: *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801 (1949); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U. S. 317, *rehearing denied*, 386 U. S. 1027 (1967); and *Iacurci v. Lummus Co.*, 387 U. S. 86 (1967) (*per curiam*).

In *Weade* this Court modified a Fourth Circuit decision insofar as that court had directed the trial court to enter judgment n.o.v. for the verdict-loser. This modification was directed because this Court recognized that there were "suggestions in the complaint and evidence" of an alternate theory of liability which might justify the grant of a new trial.

In *Neely*, although affirming the power of a Court of Appeals to direct entry of judgment n.o.v. for the verdict-loser where the verdict-winner had made no request for a new trial save in her Supreme Court brief, nevertheless this Court noted (386 U. S. at 329-30):

> "It was, of course, incumbent on the Court of Appeals to consider the new trial question in the light of its own experience with the case."

In *Iacurci*, where the Second Circuit had directed entry of judgment n.o.v. for the verdict-loser in a case where the record contained issues as to the entitlement of the verdict-winner to a new trial, this Court reversed the Court of Appeals and held that:

> "the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. Fed. Rule Civ. Proc. 50(d)." (387 U. S. at 88.)

The wisdom and justice of a remand for consideration by the trial court in the first instance of a request for new trial, made for the first time on appeal by the verdict-winner, was recognized in a rehearing dissent by Circuit Judge Lay in *O'Hare v. Merck & Company, Inc.*, 381 F. 2d 286, 295 (8th Cir. 1967) (*rehearing denied*):

> "It is my singular opinion . . . that whenever the motion presents arguable grounds, even though raised for the first time with a petition for rehearing, we should allow the trial court to pass upon the motion for a new trial, unless upon its face it should be granted or denied."

Review by this Court of the Fourth Circuit's decision and its denial of the petition for rehearing, *which made no reference* to the request for new trial, is uniquely appropriate. The Fourth Circuit itself had held that there was an improper "curtailment" of trial time. This "curtailment," however, cut both ways, not merely adversely affecting the defendant Levensons, but plaintiffs as well, who were deprived of their right to cross-examine the Levensons (NT 1527-30, 3658). It was the Levensons' own trial counsel who complained about trial time "curtailment" as having prevented the Levensons from testifying, a "curtailment" complaint which was reiterated by their newly retained counsel in their Brief (at p. 35) filed in the Court of Appeals.

If "curtailment" of trial time was a manifest abuse of discretion harming the verdict-losers, which the Fourth Circuit held, it was likewise equally a manifest abuse of discretion harming the verdict-winners. On this record, therefore, the Fourth Circuit's failure even to note this pervasive prejudice was thus a clear and manifest abuse of discretion requiring this Court's review.

CONCLUSION.

For the foregoing reasons the Court should grant this petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 74-2-W

BETTY BERNSTEIN, et al.,
Plaintiff,

v.

ROBERT LEVENSON, et al.,
Defendant.

December 23, 1974

BEFORE: The Honorable ROBERT E. MAXWELL, Judge

APPEARANCES:

For the Plaintiff: STANLEY E. PREISER, ESQ.
JOHN M. BROWN, JR., ESQ.

For the Defendants: ABRAHAM PINSKY, ESQ.
RICHARD W. BARNES, ESQ.
JOSEPH A. COMPERS, ESQ.
THOMAS McCARTHY, ESQ.

Whereupon, on the above mentioned dates, the above styled matter came on for hearings and the following is a transcript of said hearings, to-wit:

PROCEEDINGS

(The following transcript contains the ruling of the court on post-trial motions only.)

THE COURT: The Court has, along with counsel, been living with the matters that were tried and presented here. It has now been very close to eight years for this litigation.

This litigation has not been litigation that is that complex or complicated, it has been made so by the procedural involvements on both sides and the multitude of cases that have been instituted and prosecuted and brought about by various means.

The Court early in 1974 saw to the filing of a consolidated action and brought these matters all together, so that in a reasonable, orderly, well prepared sort of way we could get the issue on for trial before the Court.

Essentially stated, claim number 1, as we have grown to know this, involved automobile financing, and floor plan matters that were in the bank.

The second leg of the litigation involved the Securities and Exchange Act. The third leg involved libel and slander.

Actually what we are talking of and dealing with here are five separate causes of action, but they do boil down to three types of cases.

A quick look or a quick peek at the records in the litigation that brought all of these matters into being is enough to indicate to the uninitiated as well as to the experienced, that it would have been wholly impossible for any Court or any counsel to take the number of cases that were before the Court and try to bring them into any type of cohesive presentation that any jury or any Court record could develop.

So, with the consolidated action we were then able to give everybody his day in Court in a clear and precise sort of way. We developed the case to discovery and disclosure.

If there were any facets of the litigation that were not properly brought into the litigation either offensively

or defensively, it is not because counsel did not have the opportunity. Because counsel determined for one reason or the other, not to take advantage of the opportunity.

After a rather lengthy trial, approximately a month's duration, we finally have a jury verdict. We have judgments entered and now we are looking to post-trial motions.

The complexity, the sheer volume that has permeated this case for one motivation or another, each side ascribes to the other different views on that matter, but the sheer volume of the litigation as it was consolidated and brought down into focus less than a year ago, has caused problems for counsel. It has slowed the process of the litigation and the number of volumes of testimony of the trial stands as mute evidence of that statement.

So, we have had delays but were unavoidable, that were brought about by mechanical necessities of handling the volumes, the sheer volumes that have been pumped into this case.

Frankly, the Court has indicated and said on many occasions that the issues here are not that complex. And this is looking at it professionally and looking at it purely as a matter of law. The issues here are not that complex. However, it has been thrust upon us, and we have it, so we deal with it then as best we can.

We must remain obvious, it must be obvious to all of us that the injection of so much extraneous matters has not helped to define the issues to submit to the jury or to the Court for that matter, the question of credibility which inevitably must be resolved in the trial. That has clouded the issues and has given us a lot of problems, but I am sure that we are on top of it and we are able to ferrett out the thread that runs through the case and through the various claims as I have earlier mentioned.

In this regard I might now touch upon one of the grounds which was raised in the litigation, namely; the limit on trial time set into motion a denial of due process and, of course, many other objections which would be akin to the Court's determination after it became apparent the nature of the trial strategy. The Court's determination being that there just had to be some manner of control over the extent of litigation.

A review of the indicies of the transcripts would reflect that cross-examination was running about a ten to one ratio; ten to one as compared to direct examination. This is no problem, but we must recognize the Court's responsibility to manage litigation, and to administer to it, if we are to have effective, as well as efficient trial of cases in the courts of the land. If we are to let these matters run on ad infinitum and never end, that's one thing. But, the process of judicial administration is a concept that is being increasingly recognized and courts no longer can afford the luxury of taking forever for one case.

I would say especially when that is not necessary. For we never have justice administered on a time table, or with a time clock. But taking time into consideration with the issues of the litigation, it then becomes important for the Court to manage and to administer the litigation, so that all parties can have an appropriate opportunity to present his case and be fairly heard and be fairly presented.

Here, it became obvious to the Court and the record seems to be considerably supportive of the observation that it was a trial strategy of the defense to either keep the principals of the defense off the witness stand, or to try their case on cross-examination which, of course, was done with the defendants fully presenting their theory by cross-examination and documents and the development of facts that were directed towards the defense of the litigation.

Now, of course, the reasons for the trial strategy of pursuing cross-examination rather than to present affirmative evidence is, of course, anybody's speculation. No one doubts or would say from this vantage point that that trial strategy is either good or bad or otherwise; it was very likely felt that it was effective cross-examination on Molever, that being done, would then destroy the plaintiff's case.

The same might be said as to the witness Noel.

In other words, it might have been the trial strategy to make the defendant's case by breaking the plaintiff's credibility before the jury. Perhaps this was a case where the trial strategy was that no one before the Court wore clean hands and therefore, the question of credibility would be best assailed by cross-examination rather than by direct confrontation.

But what ever the trial strategies were, the defense chose to cross-examine the witnesses of the plaintiff over, over, and over again, rather than to present any affirmative evidence.

Now, again, whatever that trial strategy basis was—and perhaps the Court has touched upon it here in the reasons as stated this afternoon and perhaps not; these are just suppositions that would be fairly inferred from the record of this case. Everyone was given notice to proceed and everyone was given a time schedule to pursue.

Everyone was given an opportunity to fully develop his case if he chose to do so, and the defendants then determined obviously to stick with the strategy of pursuing extensive cross-examination rather than to proceed along the traditional method of a defense in an action of this general nature.

So, the Court does not believe that anybody was prejudiced by the assignment of trial time. As we got into this

case and the record not only justifies this but requires it, we had that done.

We have the affirmative issue here on behalf of the plaintiffs that there be an award of attorney's fees on claim number one. Claim number one is the so-called stockholders derivative action and the one leg of that is the Dennis Line losses phase. The jury found that the plaintiffs and others similarly situated stockholders of the Bank of Wheeling recovered Seven Hundred Thousand Dollars.

They then broke that down as Six Hundred Thousand Dollars as compensatory damages and One Hundred Thousand Dollars as punitive or exemplary damages.

The second leg of claim number one of the stockholders derivative action is the floor plan phase. The jury in that case found One Million Twenty-Three Thousand Five Hundred and Twenty Dollars as the award, and Twenty-Three Thousand, Five Hundred and Twenty Dollars being compensatory damages and One Million Dollars assigned as punitive damages.

Counsel have indicated here forty percent as a contingent fee basis would be fair and reasonable, fine.

Now, this is a matter which would appear to be at this time premature. Premature because until we have a definite fund established after judgment, after appeals have been settled on, after being pursued and then ended and all other matters are then disposed of, then these would come into being with the ripened issue of counsel fees.

Now, we are uncertain as to what we are dealing with here. So, the denial of this motion at this time is without prejudice to this matter being raised when we have a definite, final fund established and after the Court of Appeal have been pursued, which we would normally assume would be, and the judgment is finalized with or without appeal.

As to the equitable relief that is sought by the plaintiffs by reason of the finding of the jury, including the removal from office, the removal from ownership and the pledging of stock, the appointment of a trustee; all of these various matters which have brought into mind here. Here again, the relief sought is at least premature inasmuch as again, we do not have the final judgment on this matter and the rights of appeal either exhausted or abandoned.

It might very well be that the equitable relief sought here is appropriate relief for the Court to grant under the theory that is akin to pendent jurisdiction. However, there is a question of whether there has been a preemption of this particular type of relief by virtue of the State Banking Commissioner, the Federal Deposit Insurance Corporation, or the Comptroller of the United States—this is an open issue.

So, the motion for the equitable relief that is sought here by the plaintiffs will be denied at this time, but certainly without prejudice to this issue being raised again when it has ripened by virtue of the Court's judgment here being final and appeal time having been passed or otherwise considered.

Now, we are dealing here with the next substantive claim that has been brought by the defendants as against the three cases which are before the Court.

As to claim number one, now let us look at both sides of that issue. First of all, let us look to the Dennis Line losses that we have before us. The evidence in this particular adheres to two theories very effectively presented. The theories begin with the employment of a manager and involves both sides of this litigation. It involves collateral activities on both sides of this litigation with this manager. I am using the word manager for lack of a better word.

This involves activities of commission and omission as to the daily record sheets and the activities that involve

the particular transactions on the Dennis Line loans, the signing of checks, the approval of loans, the accumulation of supporting data. What I am saying is that the litigation here has a question presented squarely to the jury on credibility. The jury resolved that question. The jury resolved that and they said that the plaintiffs should recover against the Levensons on this Dennis Line loss for Seven Hundred Thousand Dollars.

Now, this was purely a factual question. This was purely a question of credibility. And while we may differ with the conclusion of the jury, as counsel obviously do in the argument, that is, in presenting the motion of the defendants, this is one of the reasons that we have juries to resolve these issues of credibility.

In this case, both sides made a very, very full presentation on this particular claim. The jury had the right to draw the conclusions and inferences and to make the definite findings. They did so and they found against the defendants in a very affirmative sort of a way. Their findings were certainly within the realm of evidence and the weight and the credibility that they gave to it and the Court does not believe that it has any right at all to invade the province of the jury in this regard.

Now, in regard to and in tandem with that, we next look to the floor plan phase of this litigation in this claim. This involved the same individuals and you might say their company, Reicharts Furniture Company. This is so, because the evidence here tied the individuals with Reicharts Furniture Company in an almost unrefutable manner.

The jury found that Twenty-Three Thousand Five Hundred and Twenty Dollars was compensatory damages for the floor plan phase of this litigation. This was based upon the Fourteen Thousand Dollars plus the principal amount involved, interest and so forth. So we have no

trouble then establishing a dollar value on a Twenty-Three Thousand Five Hundred and Twenty Dollars.

The One Million Dollars that was attributable to punitive damages in this regard is also attacked as being excessive.

Now, we must look at the floor plan, the Dennis Line loans in light of what the jury found from the evidence in this case. They found the defendants individually and again, Reicharts Furniture Company, which the jury could have very easily have found and considered the alter ego of the Levenson Brothers; they found that they had been engaged in scandelous conduct in their personal and their official relationships with the bank. They found obviously from their verdict, that the papers, the letterheads from the bank were taken out and they obviously found all of these accusatory things happened as the plaintiff urged. That it was the personal manipulation and the usage of the bank's facilities for their own personal satisfaction, gain or profit.

So, obviously, the jury in taking the actual dollar value of this Twenty-Three Thousand Dollars figure, thought that the plaintiff's case was valid, they refused to subscribe to the theory advanced by the defendants in this particular.

It seems that the floor plan, as the Court would view the weight of the evidence, and this is not the Court's function except in a detached sort of a way but, the weight of the evidence here if we would compare it is much heavier on the floor plan than it was on the Dennis Line Loans. But obviously the jury felt strongly about that and less strong about the Dennis Line Loans.

But as has been pointed out here, this is only one claim; this is but one phase. This is the personal manipulation of a bank and obviously the jury was offended and shocked and they felt that One Million, One Hundred Thousand Dollars should be paid as punishment to people

who would engage in conduct such as obviously the jury found to be the case from the evidence before it here.

The Court, as a matter of law, can not say that the jury here was inspired by passion or by prejudice or wrongful motive or by wrongful purposes. The Court can not say that the jury engaged in excesses as we look at claim one and both legs of claim one.

This finding in claim one, both legs of it when considered separately or when considered jointly, are well within the outer limits and bounds of proper evidence and inferences that can properly be drawn from the case by the jury. The Court does not believe that it should or can invade the province of the jury in this regard. The Court can not say that the jury abused its responsibilities.

Now, the 10(b)(5) action is the second claim in this case. The jury there assessed damages in the amount of Fifty-Nine Thousand Four Hundred and Ninety-Six Dollars. This is a matter that involves the Security and Exchange Act.

10(b) of the act provides, "To use or employ in connection with the purchase or sale of any securities—" and so forth. —"Any manipulative or deceptive devise or contrivance in contravention of such rules or regulations—". Then they go on to say, 10(b)(5). It shall be unlawful for any person directly or indirectly to, by the use of any means or instrumentality of interstate commerce or the mails or any facilities of any national security exchange to omit to state material facts necessary in order to make the statement made not misleading or to engage in any act, practice or course of business that operates to deceive any person in connection with the purchase or sale of any securities."

Now, we have here pretty much a question of where did, if in fact, the sale did take place? If we would look

at it as a pure sale. If we would think, the purpose of the Act, was a pure sale, then of course, the intervention of the pledge of the loan, the subsequent transactions, would remove it.

In the Kahan v. Rosentiel case 424 F. 2d 161 being a 1970 case, we find there at page 173 some language that is important.

> "The act was designed to eliminate deceptive and unfair practices in securities trading and to protect the public from inaccurate, incomplete and misleading information.
>
> The thrust of the act and decisions interpreting it is to give the investment public the opportunity to make knowing and intelligent decisions regarding the purchase or sale of securities."

Also, immediately before that conclusion the Court said, "That neither the language of Section 10(b)(5), nor the policy they were designed to effectuate, mandate an adherence to a strict purchaser-seller requirement so as to preclude suits for relief if the plaintiff can establish a causal connection between the violations alleged and the plaintiff's loss."

Now in this case, we had a contention advanced here by the plaintiff that this stock was pledged, it was made available to the security of this loan that was taken. He contends that it then became his knowledge and he had certain direct as well as circumstantial knowledge, that there were some huge losses. That the losses were going to work themselves to a rather blue future for this bank. I believe that dismal was the word which was employed in one of the analyses of the situation.

Then, we find a recovery on the bond, and we find according to the plaintiff's theory that there was no knowl-

edge of this bond. This was questioned. We are told by inferences at least by innuendo, perhaps suggestion, perhaps we are told a little more strongly than that, that in the defendant's theory of the case there was a better knowledge and a better working relationship. That if the plaintiff didn't know that there had been a recovery then he should have known. The exercise of reasonable diligence would have told him and he would have been bound to have known and that it is just so close to his having knowledge of it that he is charged in law with knowing it.

Well, all of these theories of the defendant went to the jury on this issue. Again, it became a question of credibility as to whether or not he knew about this.

The view of the plaintiffs, of course, is that in essence that if he had known of this recovery and the increased value of it then he would have went to Irving Trust and he would have redeemed his stock and would have remained in the ownership thereof. Whether or not this is true, of course, is a question of speculation and it was submitted to the jury that he was at that time broke and couldn't have come back and redeemed the stock or anything of a substantial value. The jury had that view in mind and apparently they selected between all of those facets. The record indicates any other—I have just generally touched on the different sides of the controversy. There were many other sides on that and the record will reflect and the jury obviously felt that there was a fraud perpetrated upon the seller of the stock, Molever.

The Court believes that the Securities and Exchange Act regulations, as we look to them as a matter of law, and this has been basically the contention of all parties as we have proceeded throughout the litigation, lets the Court look through the many transactions and the many proceedings, so as to get the gist of the transactions.

Here the transaction was—well, let's say that Levenson was really—it was really just the one Levenson brother, he acquired the stock from the Irving Trust. The parties held a substantial block of stock at the time in the Wheeling Bank. They had knowledge of the pledge of this stock to Irving Trust by Molever. They had knowledge of the settlement of the bond claim. They had knowledge of the particular value of the stock. They had knowledge not only of the selling and market price as it was known, but they had knowledge of the book value. They had so much extra information available here, that the jury apparently believed that the plaintiff did not have, that they were principal stockholders and that they were, the Court believes under the Act, dealing towards their own financial advancement to the detriment of the uninformed security holders, stockholders. And that it is the purpose of the Securities and Exchange Act to prevent this type of inside transactions.

The jury here on the factual issues, the record will reflect the details of those, have determined that there was a resolution of these questions on behalf of the plaintiff, rather than the theories advanced otherwise.

Now, the law seems to be that directors are insiders and cannot take advantage of inside information to enhance their own financial positions.

Now, it is urged that we have a differential here of Twenty-Five Dollar market value of the stock. This would be Twenty-Nine Dollars as paid for the stock, and therefore there was no advantage. But, can it be said that there is no advantage to moving up in the quantity ownership of stock, so that you in a sense and effect own the bank?

Well, this is exactly what happened with the acquisition of the stock by the individuals. The individuals who purchased that then became the owners and by virtue of

their interrelationships, they then became the owner of the bank and so therefore, the financial personal enhancement which followed from this, is not just the difference in the market value of the stock as distinguished from the open, arms-length trading. It goes much further here.

It was said in the Texas Gulf Sulphur case 401 F. 2d., 833. It was said there that which seems to be so applicable here at page 848.

"The essence of the rule is that anyone trading for his own account in the securities of a corporation has access, directly or indirectly to information intended to be available only for corporate purpose and not for the personal benefit of anyone, may not take advantage of such information knowing it is unavailable to those with whom he is dealing. i.e., the investing public." Citations omitted. "Insiders as directors or management or officers are, of course, by this rule precluded from so unfairly dealing."

We will skip a few lines there and get down to this. "Thus anyone in possession of material inside information must either disclose that to the investing public or if he is disabled from disclosing it in order to protect a corporate confidence or he chooses not to do so, must abstain from trading in or recommending the securities concerned with such inside information remaining undisclosed."

Well, this certainly falls within exactly this transaction. It is not the route pursued in acquisition of the securities or stock or the matters as covered by the Securities Act, it is the ultimate purpose. The Court must and has the right to permeate these various transactions, those legal fictions so to speak, so as to get to the true basis of the action and know what is being done.

Now, going on in the securities case at 849, the Court went on to say in quoting from another case note.

"The basic test of materiality is whether a reasonable man would attach importance in determining his choice of action in the transaction in question." Citations omitted.

"This, of course, encompasses any fact which in reasonable and objectionable contemplation might effect the value of corporation stock and securities."

Now, skipping several other sentences and getting down to the Court's conclusion here. "Thus material facts include not only information in disclosing the earnings and distribution of a company, but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy and sell and hold company securities."

Now, in that context, we have a situation here that falls squarely into supporting, as a matter of law, the plaintiff's theory of the case. The jury has found the element of credibility here is resolved in favor of the plaintiffs theory of the litigation.

The Stevens case tells us that it is not necessary to allege or prove, in fraud, or to make out a case under the statutes and rules, it is only necessary to prove that one of the prohibitive acts, such as a material misstatement of facts or the omission to state a material fact.

So, this is the law and the resolution of the controversy presented has been done by the jury's verdict and again, the Court believes that the verdict is well within the evidence, well within the inferences that could be drawn and the weight and the credibility of the witnesses and the documents presented and therefore, as to claim two, the so-called 10(b)(5) action, the Court believes the jury's verdict and the underpinnings of it are valid and appropriate.

Now, let's turn if we might to the claim number three. That is divided into two aspects, namely; the libel and

slander. The jury on the libel action found against Robert Levenson and assessed compensatory damages in the amount of Seven Hundred and Fifty Thousand Dollars, for the plaintiff and One Million Dollars punitive damages.

In the slander action, the jury found against Donald Levenson and Robert Levenson and assessed compensatory damages at One-Half Million Dollars, and punitive damages of One Million Dollars.

In looking to these matters, it would appear that we need to be cognizant of first, whether or not there is evidence sufficient upon which the jury's verdict can be based as to these matters.

The plaintiff advanced a plausible theory and it went to the jury. The defendants advanced a plausible theory and it too, went to the jury. Both on the issue of liability and on the issue of damages these were.

Insofar as the resolution of the credibility of these theories, there is no problem as the Court sees it, because the jury under appropriate instructions resolved the question of liability and resolved the question of damages. The Court in that regard can not say that it is inappropriate.

In looking next however, to the questions of law that have come into being, we must inquire as to this bank president, the plaintiff, then removed or as a bank director and later removed, or as a principal stockholder or later to lose his stock on the Irving Trust transaction, does he in any one or in all of these affairs become a public official?

He probably does not satisfy the public official image as in Time v. Sullivan, in that particular. But we must look to the prodginy of Times v. Sullivan and ascertain if he is a public figure and ascertain whether he as a bank president, if he is a bank president, or a former bank president, or a director, or a former director, or a principal stockholder in an institution of this nature is a public official.

The Fourth Circuit in the Time Inc. v. Johnson decision, 448 F 2nd at 378 tells us that a former professional basketball player who had been retired twelve years before, allegedly slanderous statements--he was still engaged in basketball as a college basketball coach and, they say he is a public figure.

Now, there are a number of cases from several circuits. The Eighth Circuit, the Walker v. the Pulitzer Publishing Company case, well, there are just many cases that are expanding this public figure definition.

Then we get into another area and that other area is whether this management and the operation of a bank is a public--a matter of public interest.

In other words, if he is not a public official then we can step into a public figure and then we get into public interests. Let us not overlook the public interest and the logical extension of that into a public institution. Is a bank a public institution, so as to create some observable questions of law with regard to this ever limiting policy of the Courts in matter of libel and slander?

Well, there is another aspect also in this case. That is a question of privilege. Apparently a qualified privilege that must be proper, in good faith without excess and so forth. Is there a privilege that is invested among the officials and employees of a public institution? That is, if we call a bank a public institution. Or, in the converse, and back away from the public institution and call it a private institution. Is there any differences there when the matters brought forward as libelous and slanderous are injected into it for the purpose of the management and operation of the business?

Well, there is a lot of law in the field and counsel have brought a great deal of that to the Court's attention in this matter. There's a case from the Western District of Virginia that sets up some criteria that I would just like to

inject into this matter. That is the case of Evans v. Lawson. That's found in 351 F. Supp. at 279.

Turning over now to page 276—this case was an action by an official of a private organization, a Lion's Club, for libel and slander against a Past International Director of the organization. And on a motion to dismiss, the district court judge, Judge Dalton held that the statements contained in ledgers sent to various members of the organization, of which the plaintiff was president, expressing concern over certain problems of voting irregularities at the organizations' convention and expressing defendant's view that the organization had become more political than charitable and which, insofar as referring to plaintiff, were directed at plaintiff in his official capacity with the organization, were privileged and not actionable in absence of malice.

Now, we sort of get the standard here in looking to these various matters. Now, in looking back to this Evans decision again, "In order for these people to recover in defamation action, these individuals must prove one: actual malice, or two, an utter disregard for the truth or falseness of the statement, or three, knowledge of its falseness, or four, that the statement is not directed at an organization figure in his official capacity with the organization, or five, that the statement was made by someone not substantially, directly or significantly interested in or a member of the organization, or six, that the statement, although made by someone directly, substantially and significantly interested in or a member of the organization, was made or directed to one or more persons who are not members of or directly, substantially, and significantly interested in this organization."

Now, that summarizes the many rules and indices in the various areas with regard to part of the questions that the Court has addressed itself to this afternoon.

The record of this case, the Court believes, and the law as we are required to pursue in the contracting field of libel and slander would, in this Court's judgment, make the plaintiff Molever, not a public official but a person who is very decidedly a public figure as a bank president, or as a recently terminated bank president.

The Court also believes that a person, under the record of the litigation as we have it here, who has served as a bank director also fits that public figure image in law. And again, as it would be developed from the facts and the record of this case.

The Court also feels that the subject matter of the bank is subject matter that has a public interest in it.

Now public interest in the subject matter, public interest in the publication, of course, may be a different question; it is not necessary for that to be resolved here: But, the public interest in the operations, the proper operations in the management of a bank or financial institution is certainly brought to force when we read the statutes of Congress and the statutes of the legislature and the rules and regulations of the various agencies of government that are commanded by law to oversee the management and operation of a bank.

There are very little of a bank's operations today that is kept from public view. More so now, than when this cause of action occurred.

But to be realistic here we must recognize that this controversy that occurred between these parties, which is the subject matter of this litigation, was in public interest.

This being so, and the bank being, this Court believes a public institution, we must look to determine whether the plaintiff has standing to sue. He does. He has standing to sue, but it must be established that the New York Times standard applies here and the plaintiff then must prove either actual malice or reckless disregard of the

truth in order to recover here in this libel and slander. They stand in the same position it seems, with regard to these two contentions.

Tied into this contention is the issue of qualified privilege. The qualified privilege of the parties as a member of the management, operations team of this bank. The publications did go out to the other directors. This was brought forcibly to the attention of the management and those who had policy making management business judgments and decisions to be made.

So, we must then look to the evidence in this case to determine whether those statements were made in good faith or were they made for evil, ulterior motives.

If they passed the first test then do they exceed the bounds of reasonableness and/or did the statements and the allegedly libelous and slanderous words and remarks, were they excessive?

Based on the record we have here and recognizing again, the restrictive contracting field of libel and slander, it would appear that the statements and the expressions that were made here were made in good faith insofar as this record is concerned. They were not excessive. They did not exceed the bounds of propriety. They expressed a point of view in the management of the Bank of Wheeling. It may or it may not have been a valid point of view, but we must remember that we had a Federal Deposit Insurance investigation and there were certain conclusions and certain revelations that were then brought forth. Well now, whether that was right or wrong or whether that report and investigation was correct or incorrect, it seems to this Court that the province, the business and the purpose of the directors to have an opinion on a matter of this nature when it comes to light and the expression of a point of view in the management of a business, public or private, we are of course, here involved in the public, gives a privilege to that member of the business's team management and operators to express their views free of any worry or fear that their expressions, even though it may later turn out they were based upon erroneous information, are matterms that can be held libelous or slanderous.

The jury found that the words used were libelous and slanderous. They found that the plaintiff should recover sizeable amounts of money. The Court is always reluctant to invade that province of the jury, but here this plaintiff is a person who chose to put himself in the public lime light as the law has now evolved. He is a person who has a public image and a public business, and the actors in libel and slander were operating, rightly or wrongly, upon a premise that can not in law be considered excessive, unseasonable or robbed of its good faith.

So, the Court believes that in the exercise of the application of law to the libel action and the slander action it must set aside the verdict in this regard and enter judgment for the defendant as to both legs of claim number three.

This then brings us down to a disposition of these matters. There are many other issues that are raised in this case such as a six person jury, evidentiary rulings and so forth. It is not necessary perhaps to get into those in detail for they do not appear to this Court to be grounds that are of any substantial merit or have shown to have demonstrated any prejudice to any of the parties and should not be an anchor upon which this litigation should turn from this point on. So the other grounds which are urged in support of the defendant's motion are over ruled.

The question now of our bond is pretty much the same as the question we had before, except that we are now in a different type of bond. In that regard and applying the provisions of the rule here the parties of course,

know that the bond will be different as we know the law to be in this regard. I am not sure as to the size of the verdicts that remain, but the Court still believes that the bond should remain at Two Million Dollars. I have read with interest concerning this other bond and the matters presented, but maybe we are dealing with another criteria in this case.

The Court would not be inclined on the bond issue that we had before and as we have been able to find the law on the matter now, would not be inclined to accept as surety on such a bond—the surety such as tendered here because there is too much interrelationship and too much intercontrol and too much interinvolvement between the principals and Reicharts at least, and I forget the name of the furniture company.

MR. PINSKY: Retail Furniture.

THE COURT: Yes, Retail Furniture. To make a valid and binding severability as the law apparently requires.

Title VI of the United States Code, as well as the rules, set up certain criteria for suretys and set up certain criteria for responsibilities in matters of this nature, and they are based upon that which is taught to us by the common law.

There may be, and I have not quite frankly looked into the supersedeas to determine whether or not there is any different criteria of law which is applicable to as suretyship on those type of bonds as distinguished between bonds pending the passing on post-trial motions. I doubt that there is any difference but I have not looked to see yet. I don't know.

Well, gentlemen, I will prepare a short order for the reasons stated here on the record overruling the various motions in the matter and we will have that entered. The parties are advised as to the time necessary for filing ap-

peal and what have you. You may advise the Court and opposing counsel, defendants may, as to the bond that you would propose to give in the penalty as indicated by the Court.

MR. PREISER: May it please the Court. We request that the order or that some order be entered filing the Court's opinion as stated on the record today. Will that be done automatically or how?

THE COURT: Yes. I think that we'll start out with that. As a matter af fact, it will probably start as reasons stated by the Court on record and made a part hereof and so forth.

MR. PREISER: That will be fine. Thank you.

THE COURT: That will give you something to work with and to work from.

MR. BARNES: Your Honor, will our objections be noted to the rulings in the order which you will prepare?

THE COURT: Yes. The order will state so.

MR. BARNES: Your Honor, will the time for that run from today or from the entry of the order?

THE COURT: Do you mean your time for appeal?

MR. BARNES: Yes, sir.

THE COURT: Well, I will let you answer that question.

MR. BARNES: All right, sir.

THE COURT: If it becomes necessary for me to have to pass on that, I will. All right, gentlemen. Thank you. We will now stand adjourned until tomorrow morning in Elkins.

(Whereupon, this concluded this matter for today.)

CERTIFICATE OF COURT REPORTER:

I, JOHN G. BELL, Official Court Reporter for the United States District Court, Northern District of West Virginia, sitting in Elkins, do hereby certify that the foregoing transcript of proceedings as had in Civil Action No. 74-2-W is a true and correct transcript of the same to the best of my knowledge and belief.

JOHN G. BELL

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

—

Civil Action No. 74-2-W.

—

BETTY BERNSTEIN, et al.,
Plaintiffs,

v.

ROBERT LEVENSON, et al.,
Defendants.

———

ORDER.

Following proceedings in open Court, and for reasons this day placed upon the record in this civil action, it appears to the Court that Plaintiffs' motion for attorney fees in Claim One, the shareholders' derivative action, is premature and it is

ORDERED that Plaintiffs' motion for attorney fees as to Claim One be, and the same hereby is, denied without prejudice to the matter being further considered at a later and more appropriate time.

It further appearing to the Court that Plaintiffs' motion for equitable relief is likewise premature, it is

ORDERED that Plaintiffs' motion for equitable relief be, and the same hereby is, denied without prejudice to the same being raised at a later and more appropriate time.

It is further ORDERED that

Defendants' motion for judgment notwithstanding the verdict and for a new trial as to Claim One, the shareholders' derivative suit encompassing both the alleged

Dennis loan transactions and the allegedly fraudulent floor plan arrangements be, and the same hereby are denied;

that Defendants' motions for judgment notwithstanding the verdict and for a new trial as to Claim Two, the 10-B(5) action be, and the same hereby are, denied;

and that as to Claim Three, the actions for liable and slander, Defendants' motion for judgment notwithstanding the verdict be, and the same hereby are granted, and the verdict of the jury as to Claim Three hereby is set aside and judgment is entered for the Defendants.

It is further ORDERED that each and every other ground asserted by Defendants in support of their motions for judgment notwithstanding the verdict and for new trial be, and the same hereby are, denied.

For the convenience of the parties herein prosecuting an appeal in this matter, it is

ORDERED that the supersedeas bond to be posted by Defendants, in event of appeal herein, be, and the same hereby is, set in the amount of Two Million Dollars ($2,000,000.00).

ENTER: December 24, 1974.

/s/ ROBERT E. MAXWELL,
United States District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

—

Civil Action No. 74-2-W.

—

BETTY BERNSTEIN, et al.,
Plaintiffs,

v.

ROBERT LEVENSON, et al.,
Defendants.

———

ORDER.

Following proceedings in open Court on December 23, 1974, and the entry of the Court's Order of December 24, 1974, wherein the Court made certain specific findings, Plaintiffs objected and excepted to the Court's failure to grant Plaintiffs' motion for attorney fees as to Claim One at this time, and to the Court's failure to grant Plaintiffs' motion for equitable relief at this time, and Plaintiffs further objected and excepted to the Court's granting of Defendants' motion for judgment notwithstanding the verdict as to Claim Three and the setting aside of the judgment entered thereon and entering judgment for the Defendants.

Defendants objected and excepted to the Court's failure to grant Defendants' motion for judgment notwithstanding the verdict or for a new trial as to Claim One, the shareholders' derivative action and as to Claim Two, the 10-B(5) action.

It is accordingly,

ORDERED that the respective objections and exceptions of Plaintiffs and Defendants be and they are hereby noted of record and preserved to the respective parties.

This Order is entered now for then.

ENTER Jan. 2, 1975.

/s/ ROBERT E. MAXWELL,
United States District Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1107

Irving M. Molever; Betty Bernstein; Shirley L. Weinberger, as Custodian for Lynn E. Weinberger, a minor, Jill A. Weinberger, a minor and Amy D. Weinberger, a minor; Don D. Brooks; Modern Marts Inc., a Pennsylvania corporation; Jean B. Paris; Pittsburgh and West Virginia Investment Company, a corporation,
Appellees,

v.

Robert Levenson; Donald Levenson; Reichart Furniture Company, a West Virginia corporation,
Appellants,

and

The Bank of Wheeling, a West Virginia corporation,
Defendant.

No. 75-1108

Irving M. Molever; Betty Bernstein; Shirley L. Weinberger, as Custodian for Lynn E. Weinberger, a minor, Jill A. Weinberger, a minor and Amy D. Weinberger, a minor; Don D. Brooks; Modern Marts Inc., a Pennsylvania corporation; Jean B. Paris; Pittsburgh and West Virginia Investment Company, a corporation,
Appellants,

v.

Robert Levenson; Donald Levenson; Reichart Furniture Company, a West Virginia corporation; The Bank of Wheeling, a West Virginia corporation,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING. ROBERT E. MAXWELL, *Chief Judge.*

Argued: October 7, 1975 Decided: May 3, 1976

Before BRYAN, *Senior Circuit Judge,* BUTZNER and RUSSELL, *Circuit Judges.*

Stanley F. Preiser, (W. Stuart Calwell, Jr., Preiser, and Wilson on brief) for Appellants in No. 75-1108 and for Appellees in No. 75-1107; Harold Ungar, (Francis X. Grossi, Jr., Williams, Connolly and Califano on brief) for Appellants in No. 75-1107 and Appellees in 75-1108.

BRYAN, *Senior Circuit Judge:*

These are appeals in three actions consolidated for trial, arising during 1963-1968 in the internal economy of the Bank of Wheeling, West Virginia. They embrace claims for damages flowing from these transactions:

(1) In one action, designated herein as the Rule 10b-5 case, the sale, upon default in payment of the note, of a block of shares of the Bank's stock pledged by one stockholder as collateral for a loan from a separate bank, and the purchase thereof by another stockholder of the Bank of Wheeling, were alleged to violate Section 10(b) of the Securities Exchange Act of 1934, and Securities and Exchange Commission (SEC) Rule 10b-5.[1]

1. The Act and Rule 10b-5 in their pertinent parts read as follows:

Section 10(b) of the Act, 15 USC 78j(b):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(2) In another action, now known as the derivative suit, shareholders allegedly in the interest of the Bank asserted the following claims against two other stockholders: (a) one for losses of the Bank in a practice, known as the "floor plan", between the Bank on the one hand, and on the other, these two stockholders and their solely-owned Reichart Furniture Company; and (b) the other claim is for Bank losses on certain loans averred to have been indirectly authorized by the two stockholders and unwarrantably granted to the customers of Paul Dennis, a used car dealer, and here called the Dennis losses.

(3) In still another action, presently denominated the defamation claim, two shareholders allegedly slandered and libeled a third shareholder during directors' and stockholders' meetings.[2]

1. (Cont'd.)

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 CFR 240.10b-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

2. Jurisdiction of both the derivative suit and the defamation claim was premised on diversity of citizenship; jurisdiction of the

In the first two actions, judgments for damages went for the claimants while in the last a defendant's judgment n.o.v. was granted. In appeal No. 1107 the defendants in the first two actions are the appellants; in No. 1108 the appellant is the plaintiff in the third claim.

Following now is a factual orientation of the litigated issues and the respective places of the parties therein. The Bank of Wheeling was chartered at the instance of the major stockholder, Irving Molever, the owner of several retail stores in and around Wheeling. It began business in April 1965 with Molever as its president and chief executive officer. The next largest shareholders were Robert and Donald Levenson, owners and managers of the Reichart Furniture Company, a retail appliance enterprise in Wheeling.

During its initial year, the Bank suffered the Dennis losses through a series of soured automobile loans. They had been made by the Bank's vice president, Jay Noel. The Levensons, with other directors, laid the blame for these defaults on Molever for his neglect in supervising Noel. In turn, Molever attributed the bad notes to the Levensons, averring that they had been more responsible than he for the surveillance of Noel. Shortly thereafter, in August 1966, Molever resigned as president.

Failure of the Bank could be prevented, it was anticipated, only through expansion of its capital. A plan therefor was formulated in which existing stockholders could subscribe for additional stock. Pursuant to this proposal, the Levensons subscribed for more shares and the Bank was thereby saved, but by the time of the trial the Levenson family had become the majority stockholders. Neither

2. (Cont'd.)
Rule 10b-5 case was pleaded on the Securities Exchange Act of 1934, 15 USC 78aa and, perhaps with an abundance of caution, as a Federal question involving more than $10,000 under 28 USC 1331(a). These allegations were proved without contest.

of the Levensons was an officer of the Bank but both were on its board of directors and members of its examining, loan and executive committees.

I.

The first cause of action [3] rested upon SEC Rule 10b-5. On August 17, 1966 Molever pledged 2,050 of the Bank's shares with the Irving Trust Company of New York to secure the payment of a three-months' loan to him of $78,750.00. By the terms of the note, in the event of default the pledgee was authorized to liquidate the collateral at public or private sale *without notice to the maker* of the note. In January 1968, more than 14 months after the maturity of the note, Robert Levenson purchased the obligation from the Trust Company for $59,450.00. He then notified Molever of his intention to sell the collateral at private sale, but Molever made no response. Thereupon the 2,050 shares were sold, January 11, 1968, to the wife of Robert Levenson for $29.00 per share, an aggregate sum of $59,450.00.

In the latter part of 1967, and thus prior to the sale, the Bank had recovered $170,000.00 from the surety on the fidelity bond of Noel because of his mishandling of the Dennis loans. On January 6, 1968 Molever, with all other stockholders, had been sent a copy of the financial statement of the Bank's condition as of the end of 1967. It reflected an increase in the Bank's cash account by $170,000.00.

Alleging that he was entitled under section 10(b) of the Securities Exchange Act of 1934 and the SEC Rule 10b-5, supra, to disclosure of the bond recovery before

3. Discussion of the several actions will follow the order in which they are presented by the appellants in No. 75-1107 because that appeal covers two of the three major issues in this copious record.

Levenson sold the shares, on December 31, 1969 Molever and his co-owners of the stock sued Levenson for damages.[4] The complaint alleged that Molever would not have allowed the stock to be sold if he had known of this $170,000.00 augmentation of the Bank's assets. The jury awarded Molever $59,496.00 as compensation for the loss which he contended was occasioned him by the sale.

Levenson appeals. No breach of the Act by this appellant is perceived. There was no "device, scheme or artifice to defraud . . . in connection with the purchase or sale of [the stock]." Although not demandable, Molever had been given due notice of the intended sale. Moreover, he had been sent a financial statement of the Bank showing the addition to the Bank's assets. In law on these facts he had no ground of complaint. Therefore, the verdict and the judgment in this action must be reversed and vacated.

II(a).

The plaintiffs in the derivative action were the Modern Marts, Inc., entirely owned by Molever, three of his relatives, and a friend. All were stockholders in the Bank and in reality represented Molever. Filed on January 9, 1968, the suit purported to be brought on behalf of all similarly situated shareholders for the use and benefit of the Bank. The first of its causes of action charged that Bank directors Robert and Donald Levenson and their company, Reichart Furniture Company, caused the Bank losses through a fraudulent appearance of what is known as a "floor plan".

A genuine floor plan is pursued when a wholesale supplier wishes to persuade a retailer of appliances, such

4. This action was commenced in Federal District Court for Arizona but was transferred to the District of West Virginia for trial.

as Reichart, to maintain a full store of the wholesaler's merchandise. The motivation to the retailer is the supplier's allowance to it of a discount equivalent to its bank charges for financing the purchases. To set the plan in operation, the retailer arranges with the bank for it to pay the supplier's bills for the goods and reserve liens on them until sold. From the sale proceeds the retailer satisfies the amounts owing the bank as reimbursement of the sums it advanced to the supplier.

The device actually adopted by the Levensons and Reichart and the subject of the derivative suit was, as their counsel here frankly concedes, a "deceit" of which "no defense" is made. Condensed, it was this: Reichart was quite able to buy its inventory without the aid of bank financing. Nevertheless, the company desired to obtain the discount the supplier offered. To this end, the Levensons, while directors of the Bank of Wheeling, contrived with it to mislead the supplier with a false floor plan. Upon receipt of the supplier's discounted invoice, Reichart would hand its check to the Bank for the amount of the invoice, and the Bank by its own check would then remit the money to the supplier. Letters purportedly from the Bank to the supplier were written by the Levensons on Bank stationery loaned to them by the Bank. The cost of actually issuing the checks was paid by Reichart. As there was no extension of credit by the Bank, no interest was charged. The Levensons contended that Molever had consented to allow them this use of the Bank, but Molever denied any knowledge of these machinations.

The derivative suitors charged that the Levensons had violated their duties as directors; that the Bank had been injured by this misconduct of the Levensons and Reichart; and that the directors of the Bank, despite the plaintiffs' demands, had declined to bring suit against the offenders;

and they named the Bank as a party defendant along with the Levensons, adding the allegations requisite under F. R. Civ. P. 23 ' for a derivative complaint. Verdict went against the defendants for $23,520.00 compensatory, and $1,000,000.00 punitive, damages.

Despite the inexcusable deception by the defendants, subsequent arrangements for release and indemnification negate plaintiffs' right of recovery. These were embodied in an agreement entered into on May 20, 1967 by the Bank of Wheeling, Reichart Furniture Company, Donald W. Levenson and Robert L. Levenson. It undertook to satisfy or resolve the possible liabilities of each party to the floor plan operation.

Included among these was an apprehension that the Bank might suffer a loss through responsibility to the suppliers for the discount taken by the Levensons and Reichart instead of being paid to the Bank. Although seemingly only a supplier could reclaim it, The Federal Deposit Insurance Corporation, upon its canvass of these transactions, found the suppliers disinclined to press such claims—that this course of dealing was a general practice among suppliers. Nevertheless, the FDIC did espy a remote liability upon the Bank to the suppliers in the sum of $14,270.05. Thereupon there was written into the agreement a promise that the defendants would, and in fact they did, place this amount in a savings account with the Bank of Wheeling by way of indemnity to it in the event this contingency became an actuality. Reichart and the two Levensons agreed additionally to indemnify and save the Bank harmless of "any and all claims, demands, damages and liability whatsoever" then existing or thereafter asserted by the supplier.

Next, the agreement contained a release of Reichart and the Levensons individually and as directors of the Bank of "any and all claims, demands, damages, actions

and any and all liability" to the Bank because of anything done or omitted to be done by any of the defendants relating to the floor planning.

But in the suit the plaintiffs challenge the validity of this agreement, charging that it did not rest upon an adequate consideration, that it was unfair as a restoration of the Bank's loss and that it was accomplished through undue influence of the Levensons, i.e., after Molever had resigned as president and while the Levensons were in overbearing control of the board of directors and the Bank. These questions, particularly of the presence or absence of fraud in the conclusion of the agreement, were submitted to the jury.

On the basis of the West Virginia statute, Code of West Virginia, former section 31-1-69,[5] the Court instructed the jury, in substance, that for the agreement to stand, the *defendants* had to establish that the settlement and release "were bona fide and free of fraud on the part of the directors and made in the best interests of the Bank of Wheeling and its stockholders". The jury seemingly found against the agreement's validity.

Assuming that the West Virginia statute required the defendants to substantiate the justice and bona fides of the agreement, to us they did so by clear and convincing evidence. It is overwhelming in their favor on the issue.

To begin with, as previously noted, the agreement was the suggestion of The Federal Deposit Insurance Corporation and not of the defendants' initiation. Although a concerned agency, it could perceive no liability on the Bank for the misuse of the floor plan and asked for the indemnity simply through an abundance of caution. Pro-

5. "No member of the Board of Directors shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president or other officer or employee, or be present at the Board while the same is being considered;"

tection of the Bank was the consideration to the Bank; their release was the consideration to the defendants. Thus on its face it was a complete, solid pact. Nor was it an unjust contract for the Bank; it occasioned no loss. Even if the plaintiffs were asserting a loss from that part of the Bank's business taken over by the defendants, the evidence does not purport to establish the amount of the net loss. The verdict of $23,520.10, it may be presumed, was the FDIC's estimate of the Bank's contingent liability to the suppliers, that is $14,270.05, plus interest upon it.

There was no sign of coercion by the defendants. Indeed, before the agreement was executed by the Bank, the directors had procured the opinion of reputable independent counsel on its efficacy in law. He assured them of the defensive coverage of the agreement to the Bank. Additionally, disclosing the absence of hurry or pressure, it was not signed by the Bank until some three months after the directors had approved it.

Contrary to the plaintiffs' charges, the defendants were not majority stockholders or officers or otherwise in control of the Bank during the preliminary or final stages of the agreement; they were not in that position until the time of the trial, years afterwards. Of the 15 directors, 13 were present at the February 23, 1967 meeting, when the agreement was first approved. The two Levensons withdrew from the meeting during the discussions of the proposal, returning thereafter—albeit before the voting—but did not vote. The plaintiffs have unreservedly accepted the contract's advantages to the Bank and its benefits to their shareholdings. On this incontrovertible evidence we uphold the agreement. In short, plaintiffs' proof just did not pass the test exacted by the State's jurisprudence:

> "Under the law of West Virginia, the evidence to overcome the clear and explicit terms of an express release must be strong and convincing." Chesapeake & O. Ry. Co. v. Chaffin, 184 F. 2d 948, 952 (4 Cir. 1950).

There are numerous errors assigned by the defendants to the conduct of the trial, including the lack of plaintiffs' standing under F. R. Civ. P. 23.1 to maintain the action and improper remarks by the plaintiffs' counsel in the presence of the jury. In view of the grounds of our decision, there is no need further to ponder these points. Upon defendants' motions, the District Court's final order on this cause of action must be reversed, with judgment for the defendants.

II(b).

In the second claim of the derivative suit the plaintiffs charged that approximately 480 loans were made to the automobile dealer previously mentioned, totalling $891,583.77 as of April 25, 1966. Continuing, the complaint is that, as of July 1966, from the write-off of these loans the Bank lost more than $478,945.00, the whole of which was imputable to the fault of the defendants Robert and Donald Levenson. During this period Robert was a member and chairman of the Executive Loan Committee as well as a director of the Bank; Donald was also a director, as well as a member of that Committee and chairman of the Examining Committee. Plaintiffs aver, particularly, that both Robert and Donald while serving in their several capacities in the Bank were guilty of malfeasance and non-feasance, amounting to breaches of their respective responsibilities to the Bank. As a consequence, it is said they caused the Bank to allow excessive credit and loans to the automobile dealer and his customers resulting in the losses of $478,945.00.

Especially, it is asserted, that notwithstanding defendants' duties as chairman and members of the Examining Committee, they neglected to conduct timely audits of the books and records of the Bank, and thus were derelict by permitting the Bank to grant these credits, the more so since they were in sums beyond the limit fixed by law for the Bank. These derelictions were knowingly committed, it is further pleaded, with malice and wanton disregard of defendants' duties.

Answering, the defendants Levenson deny their culpability and deny, too, every aspect of delinquency and disregard of obligations ascribed to them by the plaintiffs. Additionally, they rejoin that the Dennis loans were made with the consent, approval and knowledge of Molever, who at the time was president and chief executive officer of the Bank. Each side offered evidence supportive of its contentions. The jury's verdict was $600,000.00 in compensatory, and $100,000.00 in punitive, damages.

Ordinarily, in this state of the record, the verdict might be looked to as a final resolution of the conflict in the evidence dictating affirmance. However, there were rulings by the trial court prejudicial to the defendants, amounting to error, and requiring the vacation of the verdict and the grant of a new trial.

Initially, error occurred in the consolidation and joint trial of the three cases embracing four separately stated causes of action. This procedure did not comport with the aim of Rule 42(a) F. R. Civ. P. permitting a simultaneous hearing of "actions involving a common question of law or fact". As an example, the 10b-5 claim tendered no question of law or fact like those in the derivative and defamation suits.

The effect of the ill-advised consolidation was severely harmful and so serious as to require vacation of the verdicts and reversal of the judgments in this segment of the

litigation. Even as ultimately restricted, the proceedings lasted 15 days and absorbed over 4,500 transcribed pages of testimony. In light of such a plenitude of evidence, the jurors would have had to be of uncommonly retentive minds to allocate the proof among the four separate claims.

Again, a curtailment of the available trial days was seriously injurious to the defendants. On Thursday, April 18, 1974, after six days of hearing, the Court declared that the trial would have to be concluded on May 3 since another case was scheduled for hearing immediately thereafter. It also advised counsel that resumption of the case on the next day, Friday, April 19, was not allowable because an injunction application in another matter was fixed for presentation that day and F. R. Civ. P. 65 accorded it precedence. Nevertheless the trial was not taken up promptly after the injunction matter was completed. The Court stated a recess over the following Monday, April 22, was obligatory to give the court reporter a day off since he would be engaged in a judicial conference during the weekend.

After directing these delays the Court explained that it would divide the remaining time equally between the litigants. This computation debited each side with the periods it had consumed in questions on direct and cross-examination. By April 25, after nine trial days, the Court calculated that under this division of time the plaintiffs must rest on April 29, the defendants to have three days—April 30 through May 2—to introduce their proof.

Molever was then called to the stand by the plaintiffs. His evidence occupied almost two entire days and he was immediately followed by another witness. Plaintiffs rested on the afternoon of May 1.

This termination left to the defendants only an opportunity of something more than a day for completion

of their case. At the expiration of this allotment, defendants protested and moved for a mistrial for denial of due process, making known the additional testimony intended to be adduced. Importantly, this included the proof to be put on through the defendants Levenson in defense of all three cases.

The protest failed. The Court justified its ruling on the ground that the defendants had chosen to use most of their time making their defense through cross-examination, and thus left only a scant opening for the remainder of their proof. We believe that the time-scheduling of a trial is within the discretion of the court, but that here this discretion was unreasonably exercised.

Without reaching the due process argument, we hold these recesses were in their effect too restrictive and were reversible errors. See, generally, Annotation, 5 ALR 3d 169, et seq. Moreover, the judgment was entered in favor of "the plaintiffs, and all other stockholders of the Bank of Wheeling similarly situated." We previously held in earlier proceedings that the real party in interest in this derivative action is the Bank. Bernstein v. Levenson, 437 F. 2d 756 (4 Cir. 1971). The award of damages to the stockholders, instead of the Bank, was therefore erroneous.

The judgment on this part of the derivative suit—the Dennis losses—must be vacated and a new trial ordered thereon.

III.

In a third action—the defamation suit—on September 22, 1967 Molever complained in three counts against Robert Levenson and Donald Levenson, together with Joseph Compers, their attorney, and Abraham Pinsky, attorney for the Bank of Wheeling, for slander and libel. The statements attributed to the defendants allegedly were made, both verbally and in writing, with malice and ill-

will and with intent to injure Molever in his public standing and reputation, as well as in his position as president and member of the board of directors of the Bank of Wheeling. The first count names Robert Levenson as the sole defendant. This defamation is charged as occurring on September 29, 1966 at a meeting of the board of directors of the Bank. Compensatory damages of $150,000.00 and punitive damages of $50,000.00 were demanded.

In the second count, the defendants were Robert Levenson, Donald Levenson and Joseph Compers. Here the allegations are that at a meeting of the directors in February, 1967 the three defendants falsely and maliciously stated that Molever had been "grossly incompetent in his position as president of the Bank, was a party to an illegal and unlawful transaction and guilty of breaching his fiduciary capacity as an officer and director of the Bank". It is said that these defendants knew their words to be untrue and that Molever was thereby deprived of public confidence. Compensatory of $150,000.00 and punitive damages of $50,000.00 were sought.

In the third count, Abraham Pinsky was the lone defendant. He was charged with maliciously and falsely speaking of Molever at a meeting of the board of directors on November 25, 1966, to the effect that Molever has "wrecked this Bank and is responsible for its present financial crisis". Relief was asked against Pinsky in $250,000.00 as compensatory, and $50,000.00 as punitive, damages.

The principal defense in each instance was that there was no liability because the asserted utterances and writings were qualifiedly or conditionally privileged. They were proper comments, it is said, made without malice or ill-will, upon matters in which, the District Court recognized, all parties to the communication were immediately

concerned as directors or stockholders of the Bank or their counsel. Defendant Gompers, noted earlier, represented the Levensons, and defendant Pinsky the Bank, in respect to the past conduct of Molever with the Bank.

No verdict was rendered against Gompers or Pinsky, but the jury allowed substantial sums to the plaintiff against the Levensons on both counts. These verdicts were set aside and judgment n.o.v. entered for the defendants. Molever appeals.

West Virginia law applies in this diversity action. Assuming the words were spoken when and where the plaintiff now charges, then whether the occasion gave rise to a qualified privilege is a question of law for the court, Montgomery Ward v. Watson, 55 F. 2d 184, 187 (4 Cir. 1932). Another question for the court is "whether the publication exceeded that which the occasion justified," *Montgomery Ward*, supra. It is sometimes phrased as whether the defendant "exceed[ed] the privilege, either by vehemence of the published words or by extravagant statement," Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S. E. 2d 209, 216 (1943). Finally, the burden is upon the plaintiff to prove to the jury that the privileged statement was motivated by express malice or ill-will, *Montgomery Ward*, supra, 55 F. 2d at 186-87, also referred to as "the spirit of mischief, or of criminal indifference," *Swearingen*, supra. *See also* Guthrie v. Great American Ins. Co., 151 F. 2d 738, 740 (4 Cir. 1945), arising, like *Montgomery Ward*, in West Virginia; Ward v. Ward, 47 W. Va. 766, 35 S. E. 873 (1900).

Applying these principles the District Judge quite rightly concluded that the occasion was protected and the statements were within the limits warranted by the circumstances. Furthermore, his ruling that the evidence was insufficient to allow the jury to find malice or ill-will was a

correct legal conclusion. The vacation of the verdicts and the dismissal order were proper.

In summary, the judgment of the District Court in the defamation suit will be affirmed; the judgment on the second claim—the Dennis line loans—in the derivative suit will be reversed and the claim remanded for a new trial; and the judgments on the remaining claims will be reversed with final judgments for the defendants therein.

Affirmed in part;
Reversed in part; and
Remanded in part.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

No. 75-1107.

Irving M. Molever, et al.,
Appellees,

v.

Robert Levenson, et al.,
Appellants,

and

The Bank of Wheeling, a West Virginia Corporation,
Defendant.

No. 75-1108.

Irving M. Molever, et al.,
Appellants,

v.

Robert Levenson, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA,
AT WHEELING.
ROBERT E. MAXWELL, *Chief Judge.*

ORDER DENYING PETITION FOR REHEARING.

(Filed June 16, 1976)

Upon consideration of the petition for rehearing and of the suggestion for a rehearing in banc, no request for a

poll of the entire court having been made as provided by the Appellate Rule 35(b), now with the concurrence and approval of Judges Butzner and Russell, the other members of the hearing panel, it is

ADJUDGED and ORDERED that the said petition for rehearing be, and it is hereby, denied.

FOR THE COURT:

/s/ ALBERT V. BRYAN,
Senior United States Circuit Judge.

APPENDIX D.

U. S. Constitution.

First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Securities Exchange Act of 1934.

Section 10(b), 15 U. S. C. § 78j:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities and Exchange Commission Rule 10b-5, 17 C. F. R. § 240.10b-5 (1976):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Uniform Commercial Code.

N. Y. Uniform Commercial Code § 9-506; W. Va. Code § 46-9-506:

> At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 or before the obligation has been discharged under Section 9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

Pennsylvania Statute.

12 Purdon's Pa. Stat. Ann. § 1584a:

(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(a) The defamatory character of the communication;

(b) Its publication by the defendant;

(c) Its application to the plaintiff;

(d) The recipient's understanding of its defamatory meaning;

(e) The recipient's understanding of it as intended to be applied to the plaintiff;

(f) Special harm resulting to the plaintiff from its publication;

(g) Abuse of a conditionally privileged occasion.

(2) In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(a) The truth of the defamatory communication;

(b) The privileged character of the occasion on which it was published;

(c) The character of the subject matter of defamatory comment as of public concern.

West Virginia Code.

W. Va. Code, 1931, as amended, § 31-1-69 (repealed effective July 1, 1975):

No member of the Board of Directors shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president or other officer or employee, or be present at the Board while the same is being considered. . . .

Federal Rules of Civil Procedure.

Rule 50(c):

. . .

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

Rule 50(d):

. . . If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.